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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11

12 PAUL HUPP,

13 Plaintiff,

14
15 vs.
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17
18 SAN DIEGO COUNTY, et al.
19

20 Defendants.
21
22

CASE NO. 12cv0492-GPC-RBB

ORDER:

**1) GRANTING DEFENDANTS
CITY OF SAN DIEGO AND
RAYMOND WETZEL'S MOTION
FOR SUMMARY JUDGMENT**

[Dkt. No. 204.]

**2) DENYING PLAINTIFF'S EX
PARTE MOTION TO STRIKE**

[Dkt. No. 274.]

3) VACATING MOTION HEARING

23 Presently before the Court is a motion for summary judgment filed by
24 Defendants City of San Diego and Raymond Wetzel (collectively, "Defendants")
25 pursuant to Federal Rules of Civil Procedure 56. (Dkt. No. 204.) The Parties have
26 filed several briefs in support of and in opposition to Defendants' motion. (Dkt.
27 Nos. 236, 244, 264, 270.) In addition, Plaintiff has filed an ex parte motion to strike
28 Defendants' reply brief filed in response to Defendants' motion. (Dkt. No. 274.) The

1 Court finds the motions suitable for disposition without oral argument. Civ. L. R.
2 7.1(d)(1). Having considered the entire record of this case, the Parties' respective
3 briefs, submitted evidence, and the applicable law, and for the following reasons,
4 the Court **DENIES** Plaintiff's ex parte motion to strike and **GRANTS** Defendants'
5 motion for summary judgment.

6 **FACTUAL BACKGROUND**

7 As detailed in prior orders, this action stems from a lengthy history of state
8 civil contempt and criminal court proceedings against Plaintiff Paul Hupp
9 ("Plaintiff") as well as Plaintiff's subsequent detention in San Diego County jail.
10 The present motions concern the liability of San Diego Police Department Detective
11 Raymond "Charlie" Wetzel ("Defendant Wetzel" or "Detective Wetzel") and the
12 City of San Diego for alleged failure to turn over exculpatory Brady evidence
13 during Plaintiff's civil contempt proceedings, as well as their liability for emotional
14 distress and failure to hire, train, discipline, and retain detectives to properly turn
15 over exculpatory evidence. (Dkt. No. 204.)

16 As alleged in Plaintiff's Third Amended Complaint ("TAC"), the San Diego
17 Superior Court entered a three-year restraining order against Plaintiff on November
18 15, 2010. (Dkt. No. 64, "TAC" ¶ 26.) The restraining order prohibited Plaintiff from
19 contacting or harassing Administrative Law Judge Freedman, (*id.*), a judge who
20 entered a civil judgment against Plaintiff in or around 1998. (Dkt. No. 204-5,
21 "Wetzel Decl." ¶ 3.) On July 20, 2011, ALJ Freedman applied for civil contempt of
22 court charges against Plaintiff based on accusations that Plaintiff sent ALJ
23 Freedman four letters in violation of the restraining order. (TAC ¶ 27.) On
24 November 16, 2011, the Superior Court found Plaintiff guilty of violating the
25 restraining order beyond a reasonable doubt and sentenced Plaintiff to 25 days in
26 custody and a \$5,000 fine. (TAC ¶ 32.) The court ordered Plaintiff to self-surrender
27 on January 3, 2012 to serve his sentence. (Wetzel Decl. ¶ 3.)

28 On December 30, 2011, Defendant Wetzel, in his capacity as a police officer

1 with the San Diego Police Department, was assigned to investigate “allegations of
2 violations of California Penal Code section 422 (criminal threats) and California
3 Penal Code section 166(a)(4) (Contempt of Court) against Paul Hupp.” (Wetzel
4 Decl. ¶ 3.) Detective Wetzel learned that ALJ Freedman received an additional
5 threatening letter on December 29, 2011. (Id. ¶ 4, Ex. 1.) The letter expressly
6 threatened ALJ Freedman’s life. (Id.) Detective Wetzel undertook various steps to
7 investigate the charges against Plaintiff. (Id. ¶¶ 4-13.) Based on his “investigation,
8 knowledge and experience,” Detective Wetzel determined “that the elements of
9 Penal Code section 422 (Criminal Threats) and Penal Code section 166 (Contempt
10 of Court) were met.” (Id. ¶ 13.) Detective Wetzel then “turned over [his] entire
11 investigative file to the District Attorney’s office.” (Id. ¶ 13.)

12 On January 13, 2012, while in custody serving his civil contempt sentence,
13 Plaintiff was arraigned on the criminal threats and contempt of court charges. (Dkt.
14 No. 264-1, Hupp Decl. Ex. 3.) At the arraignment, the government requested an
15 increase in Plaintiff’s bail due to evidence of “prelonged[sic] and apparently
16 escalating threat from Mr. Hupp.” (Id.) Describing the threatening letter ALJ
17 Freedman received on December 29, 2011, the government requested a bail increase
18 of \$200,000, for a total bail of \$250,000. (Id.) The court set Plaintiff’s bail at
19 \$150,000. (Id.)

20 PROCEDURAL BACKGROUND

21 On February 28, 2012 Plaintiff Paul Hupp, proceeding *pro se*, filed this civil
22 action pursuant to 42 U.S.C. § 1983. (Dkt. No. 1.) On August 28, 2012, Plaintiff
23 filed a TAC, the current operative complaint. (Dkt. No. 64.) The TAC names eight
24 Defendants, including the County of San Diego, the City of San Diego, the City of
25 Beaumont, and five individual Defendants. (Id.) In the TAC, Plaintiff alleges the
26 following causes of action: (1) withholding of “Brady” evidence; (2) conspiracy to
27 withhold “Brady” evidence; (3) interference with legal mail; (4) unlawful detention;
28 (5) intentional infliction of emotional distress; (6) gross negligence in the hiring of

1 deputy district attorneys and peace officers; (7) gross negligence in the training of
 2 deputy district attorneys and peace officers; (8) gross negligence in the supervision
 3 of deputy district attorneys and peace officers; (9) gross negligence in the retention
 4 of deputy district attorneys and peace officers; (10) declaratory and injunctive relief
 5 as to the Defendant Kiernan's ineffective assistance as counsel; (11) declaratory and
 6 injunctive relief against San Diego Sheriff's Department; (12) interference with free
 7 speech, right to petition government and legal proceedings due to wrongful search
 8 and seizure. (TAC ¶¶ 47-141.)

9 On December 6, 2013, Defendants Raymond "Charlie" Wetzal and the City
 10 of San Diego filed the present motion for summary judgment or partial summary
 11 judgment as to Causes of Action 1, 2, 5, 6, 7, 8, and 9 as alleged against them in
 12 Plaintiff's TAC. (Dkt. No. 204.) On December 10, 2013, this Court set a briefing
 13 schedule requiring Plaintiff to file a response on or by December 27, 2013. (Dkt.
 14 No. 128.) On December 24, 2013, Plaintiff filed a motion for extension of time to
 15 respond to Defendants' motion for summary judgment pursuant to Federal Rule of
 16 Civil Procedure 56(d). (Dkt. No. 215.) Plaintiff sought "30 days to respond to CITY
 17 and WETZEL'S motion for summary judgment *after* both have produced
 18 meaningful discovery to Plaintiff." (*Id.* at 4) (emphasis in original). In support of the
 19 motion for extension of time, Plaintiff submitted a declaration stating that Plaintiff
 20 is litigating multiple cases simultaneously, (Dkt. No. 215 at 6), and that Plaintiff
 21 lacks meaningful discovery from Defendants necessary to prepare an opposition to
 22 the motion for summary judgment, (*id.* at 8-9). The Court found that neither reason
 23 justified a stay on consideration of Defendants' motion for summary judgment
 24 under Federal Rule of Civil Procedure 56(d).¹ The Court therefore denied Plaintiff's
 25 motion for extension of time. (Dkt. No. 220.)

26 However, recognizing that Plaintiff proceeds *pro per*, the Court exercised

27
 28 ¹Prior to 2010, Rule 56(d) was numbered as Rule 56(f). See Advisory Committee
 notes to 2010 Amendment ("Subdivision (d) carries forward without substantial change
 the provisions of former subdivision (f).")

1 discretion pursuant to Federal Rule of Civil Procedure 6(b)(1) to grant Plaintiff an
2 extension of time for good cause. (Id.) Accordingly, the Court continued by two
3 months the hearing set to hear Defendants' motion and allowed Plaintiff an
4 additional month, until February 28, 2014, to prepare a responsive brief. (Id.)

5 On February 28, 2014, Plaintiff filed a second ex parte motion for extension
6 of time to file a response to Defendants' motion for summary judgment. (Dkt. No.
7 238.) Plaintiff claimed he was not aware he needed to identify the specific facts
8 further discovery would reveal in order to request an extension of time, (id. at 3),
9 and provided a declaration stating that he "expect[ed] 'specific facts' from [his]

10 **INITIAL FIRST ROUND OF DISCOVERY REQUESTS** to reveal that

11 Defendants **withheld exculpatory evidence** from Plaintiff in his civil contempt
12 hearing in 2011." (Id. at 7) (emphasis in original). On March 28, 2014, the Court
13 again found that Plaintiff had failed to identify specific facts further discovery
14 would reveal to justify an extension of time under Rule 56(d). (Dkt. No. 245 at 3.)

15 However, again recognizing that Plaintiff proceeds in this matter *pro per* and
16 that Plaintiff then had a motion to compel discovery from Defendants that was still
17 under consideration by Magistrate Judge Brooks, the Court temporarily stayed the
18 briefing schedule on the present motion for summary judgment pending a ruling on
19 Plaintiff's motion to compel discovery from Defendants. (Id.) On April 10, 2014,
20 Judge Brooks granted in part and denied in part Plaintiff's motion to compel
21 discovery from Defendants City of San Diego and Raymond Wetzel. (Dkt. No. 251.)
22 Specifically, the court granted Plaintiff's motion to compel: (1) two answers from
23 Defendants to Plaintiff's requests for admission; and (2) certain materials pursuant
24 to a protective order limiting the dissemination of those materials. (Dkt. No. 251.)
25 In all other respects, the court denied Plaintiff's motion to compel discovery from
26 Defendants. (Id.) This Court accordingly reset a briefing schedule on the present
27 Motion for Summary Judgment, requiring Plaintiff to file a response to the motion
28 on or by June 20, 2014. (Dkt. No. 252.)

1 On May 5, 2014, Plaintiff filed a motion to compel compliance with the
2 court's April 10, 2014 order, stating that Defendants had produced only the court-
3 ordered answers to Plaintiff's requests for admission. The Parties were unable to
4 stipulate to a protective order. (Dkt. No. 255, 255-1.) On June 16, 2014, Defendants
5 filed a response to Plaintiff's motion to compel compliance, (Dkt. No. 262), along
6 with an ex parte motion for a protective order, (Dkt. No. 263). On June 24, 2014,
7 the court denied Plaintiff's motion to compel compliance and granted Defendants'
8 request for a protective order, conditioning Plaintiff's receipt of relevant discovery
9 documents on his agreement to Defendants' protective order. (Dkt. No. 265.)

10 Plaintiff filed a response to Defendants' pending Motion for Summary
11 Judgment on June 20, 2014. (Dkt. No. 264.) Defendants filed a reply on July 7,
12 2014. (Dkt. No. 270.) On July 18, 2014, Plaintiff filed an ex parte motion to strike
13 Defendants' reply brief. (Dkt. No. 274.)

14 LEGAL STANDARD

15 Federal Rule of Civil Procedure 56 empowers the Court to enter summary
16 judgment on factually unsupported claims or defenses, and thereby "secure the just,
17 speedy and inexpensive determination of every action." Celotex Corp. v. Catrett,
18 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the "pleadings,
19 depositions, answers to interrogatories, and admissions on file, together with the
20 affidavits, if any, show that there is no genuine issue as to any material fact and that
21 the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).
22 A fact is material when it affects the outcome of the case. Anderson v. Liberty
23 Lobby, Inc., 477 U.S. 242, 248 (1986).

24 The moving party bears the initial burden of demonstrating the absence of
25 any genuine issues of material fact. Celotex Corp., 477 U.S. at 323. The moving
26 party can satisfy this burden by demonstrating that the nonmoving party failed to
27 make a showing sufficient to establish an element of his or her claim on which that
28 party will bear the burden of proof at trial. Id. at 322-23. If the moving party fails

1 to bear the initial burden, summary judgment must be denied and the court need not
 2 consider the nonmoving party's evidence. Adickes v. S.H. Kress & Co., 398 U.S.
 3 144, 159-60 (1970).

4 Once the moving party has satisfied this burden, the nonmoving party cannot
 5 rest on the mere allegations or denials of his pleading, but must "go beyond the
 6 pleadings and by her own affidavits, or by the 'depositions, answers to
 7 interrogatories, and admissions on file' designate 'specific facts showing that there
 8 is a genuine issue for trial.'" Celotex, 477 U.S. at 324. If the non-moving party
 9 fails to make a sufficient showing of an element of its case, the moving party is
 10 entitled to judgment as a matter of law. Id. at 325. "Where the record taken as a
 11 whole could not lead a rational trier of fact to find for the nonmoving party, there is
 12 no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
 13 475 U.S. 574, 587 (1986). In making this determination, the court must "view[] the
 14 evidence in the light most favorable to the nonmoving party." Fontana v. Haskin,
 15 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in credibility
 16 determinations, weighing of evidence, or drawing of legitimate inferences from the
 17 facts; these functions are for the trier of fact. Anderson, 477 U.S. at 255.

18 DISCUSSION

19 I. Motion to Strike

20 Plaintiff has filed a motion to strike Defendant's five-page reply brief,
 21 claiming the brief "go[es] far outside of the opposition papers of Plaintiff." (Dkt.
 22 No. 274 at 3.) Defendants' reply brief, (Dkt. No. 270), raises four arguments: (1)
 23 Plaintiff's opposition failed to present evidence to defeat summary judgment; (2)
 24 Plaintiff's Brady claim, as articulated in Plaintiff's opposition, is not actionable
 25 under 42 U.S.C. § 1983; (3) Plaintiff's opposition brief concedes that Plaintiff
 26 received the allegedly withheld exculpatory Brady evidence at issue in this case;
 27 and (4) Plaintiff is not entitled to any other continuances. (Dkt. No. 270.) As an
 28 initial matter, the Court disagrees that Defendants' reply brief exceeds the scope of

1 Plaintiff's Opposition.

2 However, even if Defendants' reply brief can be read as exceeding the scope
3 of Plaintiff's opposition papers, district courts have broad discretion to consider
4 arguments first raised in a reply brief. Lane v. Dept. of Interior, 523 F.3d 1128,
5 1140 (9th Cir.2008) (citing Glenn K. Jackson, Inc., 273 F.3d at 1201–02)). The
6 Court finds that, as with Plaintiff's previous motion to strike the reply brief filed by
7 other Defendants in this case, (see Dkt. No. 202-1), Plaintiff utilizes the present
8 motion to strike to respond substantively to Defendants' arguments without leave
9 from the Court to submit a sur-reply. (Dkt. No. 274 at 2-5.) Accordingly, the Court
10 finds that Plaintiff has not been prejudiced by any arguments raised in Defendant's
11 reply brief and DENIES Plaintiff's motion to strike. See Koerner v. Grigas, 328
12 F.3d 1039, 1048-49 (9th Cir. 2003) (new arguments made in a movant's reply brief
13 are reviewed by the court (1) "for good cause shown"; (2) when it is raised in the
14 opponent's brief; or (3) if failure to raise the issue properly did not prejudice the
15 opposing party).

16 As an independent, alternative reason for denying Plaintiff's motion to strike,
17 the Court finds that Defendants' reply brief does not impact the Court's substantive
18 determination of the merits of Defendants' motion for summary judgment. The
19 Court accordingly DENIES Plaintiff's motion to strike Defendants' reply brief as
20 moot. See Vaxiion Therapeutics, Inc. v. Foley & Lardner LLP, 593 F. Supp. 2d
21 1153, 1161 (S.D. Cal. 2008) (Gonzalez, J.).

22 **II. Motion for Summary Judgment**

23 Defendants move for summary judgment on the grounds that: (1) Plaintiff
24 lacks evidence that Detective Wetzel committed a Brady violation; (2) "Conspiracy
25 to commit Brady violations" is not a legally cognizable cause of action; (3)
26 Detective Wetzel is protected by absolute and qualified immunity; (4) Plaintiff's
27 causes of action against the City of San Diego did not comply with the California
28 Tort Claims Act; and (5) Plaintiff has failed to produce evidence of a custom,

1 policy, or practice leading to an alleged Monell violation. (Dkt. No. 204, 204-1.)

2 **A. Brady Violation and Conspiracy to Commit Brady Violation**

3 Plaintiff's first and second causes of action in his TAC seek to hold
4 Defendant Raymond Wetzel and the San Diego Police Department as an agency of
5 Defendant City of San Diego liable for committing Brady violations as well as for
6 conspiracy to commit a Brady violation(s). (TAC at 12-16.) In Brady v. Maryland,
7 373 U.S. 83, 87 (1963), the Supreme Court recognized that suppression of evidence
8 favorable to the accused by the prosecution violates due process. A Brady violation
9 has three components: "[1] The evidence at issue must be favorable to the accused,
10 either because it is exculpatory, or because it is impeaching; [2] that evidence must
11 have been suppressed by the State, either willfully or inadvertently; and [3]
12 prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999)
13 (numbers added).

14 Defendants move for summary judgment on Plaintiff's Brady-related claims
15 on the ground that Plaintiff has "presented no evidence that Detective Wetzel
16 committed a *Brady* violation other than his own conclusory allegations of the
17 same." (Dkt. No. 204-1 at 8.) Plaintiff argues facts preclude summary judgment on
18 his Brady claims because his declaration demonstrates that Defendant Wetzel
19 "withheld exculpatory Brady evidence at Plaintiff's January 13, 2012 arraignment,
20 causing an excessive bond amount to be requested by the People and granted by
21 Judge Szumowski; forcing Plaintiff to assume liability for a bond premium far in
22 excess of what would have been granted but for the withheld exculpatory Brady
23 evidence at the hands of WETZEL." (Dkt. No. 264 at 3.) To support his claim,
24 Plaintiff has filed the transcript of his January 13, 2012 arraignment, (Dkt. No. 264-
25 1, Hupp Decl. Ex. 3), as well as a discovery receipt demonstrating that the first
26 batch of discovery turned over to Plaintiff was dated January 24, 2012, (id. Ex. 4).

27 The Court finds that Plaintiff has failed to meet his burden of producing
28 evidence sufficient to withstand summary judgment on his Brady-related claims.

1 See Celotex, 477 U.S. at 325 (holding that if the non-moving party fails to make a
2 sufficient showing of an element of its case, the moving party is entitled to
3 judgment as a matter of law). As articulated in Plaintiff's opposition to Defendants'
4 motion for summary judgment, Plaintiff claims Defendants are liable for Detective
5 Wetzel's failure to turn over exculpatory evidence prior to Plaintiff's January 13,
6 2012 arraignment, resulting in an elevated bond premium. (Dkt. No. 264 at 3.)
7 However, Plaintiff has offered no evidence to support a contention that: (1) the
8 evidence at issue was favorable to him; or (2) that Detective Wetzel had the
9 evidence prior to Plaintiff's arraignment. See Strickler, 527 U.S. at 281-82. Neither
10 has Plaintiff offered any evidence to support a claim that Defendants conspired to
11 commit Brady violation(s). Given Plaintiff's complete failure of proof on two
12 elements of his Brady claim, the Court finds that Defendants are entitled to
13 judgment as a matter of law.

14 The Court notes that, as discussed in detail below, the Court is not compelled
15 by Plaintiff's argument that inadequate discovery is to blame for Plaintiff's sparse
16 evidentiary showing. (Dkt. No. 264 at 4.) In particular, Plaintiff has not provided
17 evidence of the allegedly exculpatory evidence at issue in this case that forms the
18 basis for his Brady violation claims. This omission may not be blamed on
19 inadequate discovery, as the allegedly exculpatory evidence was not part of
20 Plaintiff's motion to compel discovery, (Dkt. No. 152), and indeed the evidence
21 Plaintiff *has* provided indicates that Plaintiff is in possession of the allegedly
22 exculpatory evidence. (Dkt. No. 264-1, Hupp Decl. Ex. 4) (evidence of receipt of
23 disclosures received by Plaintiff's defense counsel on January 24, 2012). Plaintiff
24 has not proffered or explained his failure to proffer the allegedly exculpatory
25 evidence in opposition to summary judgment. Neither has Plaintiff submitted any
26 affidavits, including his own, in opposition to summary judgment on his Brady
27 claims. Accordingly, the Court GRANTS Defendants' motion for summary
28 judgment on Plaintiff's Brady violation and conspiracy to commit Brady violations

1 claims.

2 **B. Remaining Causes of Action**

3 In addition, Defendants move for summary judgment on Plaintiff's remaining
4 claims against Defendant Wetzel and Defendant City of San Diego, arguing
5 Plaintiff has not satisfied the requirements of the California Tort Claims Act in
6 order to sue the City of San Diego for intentional infliction of emotional distress or
7 negligence, and that Plaintiff has not produced any evidence of a custom, policy, or
8 practice that led to a constitutional violation under Monell v. Department of Social
9 Services of City of New York, 436 U.S. 658 (1978). (Dkt. No. 204-1.)

10 Plaintiff's response fails to address any arguments raised by Defendants in
11 favor of summary judgment on the fifth, sixth, seventh, eighth, or ninth causes of
12 action alleged against Defendants in Plaintiff's TAC. (Dkt. No. 264.) Neither does
13 Plaintiff's declaration in opposition to summary judgment offer any evidence to
14 contradict or oppose Defendants' motion as it relates to Plaintiff's fifth, sixth,
15 seventh, eighth, or ninth causes of action against Defendants. (Dkt. No. 264-1.)

16 Due to Plaintiff's failure to respond to Defendants' motion as it pertains to
17 Plaintiff's fifth, sixth, seventh, eighth, or ninth causes of action against Defendants,
18 the Court deems that portion of Defendants' motion unopposed. A district court may
19 not grant a motion for summary judgment solely because the opposing party has
20 failed to file an opposition. Cristobal v. Siegel, 26 F.3d 1488, 1494–95 & n. 4 (9th
21 Cir. 1994). The court may, however, grant an unopposed motion for summary
22 judgment if the moving party's papers are themselves sufficient to support the
23 motion and do not on their face reveal a genuine issue of material fact. See Carmen
24 v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1029 (9th Cir. 2001).

25 **1. Plaintiff's Fifth Cause of Action: Emotional Distress**

26 Plaintiff's fifth cause of action seeks to hold Defendants liable for emotional
27 distress inflicted by Defendants' "numerous criminal acts and civil wrongs as
28 outlined in this complaint." (TAC ¶ 88.)

1 Defendants move for summary judgment on Plaintiff's emotional distress
2 claim as on the ground that Plaintiff failed to present his claim to the City prior to
3 filing his claim for money damages. (Dkt. No. 204-1 at 5.) Under the California Tort
4 Claims Act, California Government Code sections 810-978.8, presentation of a
5 claim for money damages against a public entity or public employee (the
6 "presentation requirement") is a prerequisite to filing suit. State of California v.
7 Superior Ct., 32 Cal. 4th 1234, 1239 (2004) ("[F]ailure to timely present a claim for
8 money or damages to a public entity bars a plaintiff from filing a lawsuit against
9 that entity.").

10 Here, Defendants submit the uncontroverted declaration of Deputy City
11 Attorney Christina M. Milligan stating that she received Plaintiff's "Claim Against
12 the City of San Diego" on September 21, 2012 - nearly seven months after the filing
13 of Plaintiff's initial Complaint in the above-captioned matter. (Dkt. No. 204-3,
14 Milligan Decl. ¶ 2.) As the California Supreme Court has held that the presentation
15 requirement under the California Tort Claims Act is a "condition precedent to
16 plaintiff's maintaining an action against defendant, in short, an integral part of
17 plaintiff's cause of action," State of California v. Superior Court, 32 Cal. 4th at
18 1240, the Court finds that Defendants' evidence is sufficient to support their motion
19 for summary judgment on Plaintiff's emotional distress claim and does not on its
20 face reveal a genuine issue of material fact. See Carmen, 237 F.3d at 1029.
21 Accordingly, the Court GRANTS Defendants' motion for summary judgment on
22 Plaintiff's fifth cause of action.

23 **2. Sixth-Ninth Causes of Action**

24 Plaintiff's sixth through ninth causes of action seek to hold Defendant City of
25 San Diego liable for "gross negligence" in the hiring, training, supervision, and
26 retention of peace officers. (TAC at 21-27.)

27 Defendants move for summary judgment on Plaintiff's sixth through ninth
28 causes of action on two grounds: (1) to the extent that Plaintiff puts forth a

1 negligence theory, Plaintiff has failed to identify a statutory basis for imposing
2 liability against the City; and (2) to the extent that Plaintiff puts forth a section 1983
3 “custom, policy or practice” theory of liability (“Monell violation”), Plaintiff has
4 failed to produce evidence of a custom, policy, or practice. (Dkt. No. 204-1 at 6-7.)

5 As to a possible negligence theory, under the California Torts Claims Act, a
6 public entity is not liable for injuries except as provided by statute. Cal. Gov’t Code
7 § 815; see also Zelig v. Cty. of Los Angeles, 27 Cal. 4th 1112, 1127-28 (2002).

8 Plaintiff has not, in his complaints or in opposition to summary judgment, pointed
9 to a statutory basis under which the City of San Diego may be liable for gross
10 negligence for failure to properly hire, train, supervise, or retain peace officers, and
11 the Court knows of none. Accordingly, to the extent that Plaintiff asserts a
12 negligence theory in the sixth through ninth causes of action in his TAC, the Court
13 GRANTS Defendants’ motion for summary judgment on these claims.

14 As to a possible Monell violation theory under section 1983, there is no
15 *respondeat superior* liability under 42 U.S.C. § 1983. Monell v. Dep’t of Social
16 Services of City of New York, 436 U.S. 658, 692 (1978). Instead, a government
17 entity can only be held liable under section 1983, if “a policy, practice, or custom of
18 the entity can be shown to be a moving force behind a violation of constitutional
19 rights.” Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011). In order to
20 establish liability for governmental entities under Monell, a plaintiff must prove “(1)
21 that [the plaintiff] possessed a constitutional right of which [s]he was deprived; (2)
22 that the municipality had a policy; (3) that this policy amounts to deliberate
23 indifference to the plaintiff’s constitutional right; and, (4) that the policy is the
24 moving force behind the constitutional violation.” Plumeau v. Sch. Dist. No. 40
25 Cnty. of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997) (internal quotation marks
26 omitted). “In limited circumstances, a local government’s decision not to train
27 certain employees about their legal duty to avoid violating citizens’ rights may rise
28 to the level of an official government policy for purposes of § 1983.” Connick v.

1 Thompson, 131 S. Ct. 1350, 1359 (2011).

2 The Court finds that Plaintiff has offered no evidence showing a genuine
3 issue for trial on the question of whether Defendant City of San Diego had or has a
4 policy that amounts to deliberate indifference of Plaintiff's constitutional rights. As
5 an initial matter, as the Court found above, Plaintiff has not proffered sufficient
6 evidence to support his claim of a Brady violation by Defendants. Accordingly,
7 Plaintiff has not demonstrated he was deprived of a constitutional right.
8 Furthermore, Plaintiff has not offered any evidence of a policy or practice that
9 amounts to deliberate indifference of his constitutional rights. Indeed, Plaintiff's
10 opposition to Defendants' motion for summary judgment points only to allegedly
11 withheld evidence from a single arraignment while Plaintiff was in custody. Even if
12 Plaintiff were able to prove the alleged Brady violation at issue, this violation would
13 fall short of a claim for deliberate indifference under Monell. See City of Oklahoma
14 City v. Tuttle, 471 U.S. 808, 823-24 (1985) ("Proof of a single incident of
15 unconstitutional activity is not sufficient to impose liability under Monell, unless
16 proof of the incident includes proof that it was caused by an existing,
17 unconstitutional municipal policy, which policy can be attributed to a municipal
18 policymaker."). In the absence of any evidence supporting Plaintiff's claim of a
19 deliberately indifferent City of San Diego policy or practice, the Court GRANTS
20 Defendants' motion for summary judgment on Plaintiff's sixth through ninth causes
21 of action alleging grossly negligent hiring, training, and retention of peace officers
22 against San Diego County in violation of section 1983.

23 **III. Extension of Time for Discovery**

24 Plaintiff utilizes the majority of his opposition to Defendants' Motion for
25 Summary Judgment to request a further extension of time to reply to Defendants'
26 motion. (Dkt. No. 264 at 1-5, 9.) Plaintiff's ex parte motion to strike Defendants'
27 reply brief likewise rehashes arguments against this Court's previous Orders finding
28 that Plaintiff has not justified a further extension of time to oppose the present

1 motion for summary judgment under Federal Rules of Civil Procedure 56(d). (Dkt.
2 No. 274 at 8-9.) The Court DENIES the request.

3 As an initial matter, the Court has set forth Plaintiff's burden in opposing
4 motions for summary judgment in previous Orders, (see Dkt. Nos. 221, 228), and
5 has set forth Plaintiff's burden to request extensions of time to oppose a motion for
6 summary judgment under the Federal Rules, (see Dkt. Nos. 220, 245) (quoting Fed.
7 R. Civ. P. 56(d); Tatum v. City & Cty. of San Francisco, 441 F.3d 1090, 1100 (9th
8 Cir. 2006)). Plaintiff may not claim ignorance of the evidentiary requirements for
9 demonstrating issues of fact for trial or justifying a continuance under Rule 56(d).

10 Furthermore, the Court rejects Plaintiff's characterization of this Court's
11 Orders as stating "ridiculous claims . . . that MSJ can be granted without any
12 discovery being produced whatsoever." (Dkt. No. 274 at 8.) To be clear, this Court
13 has previously rejected Plaintiff's requests for extensions of time to respond to
14 motions for summary judgment under Rule 56(d) due to Plaintiff's failure to make
15 an adequate showing regarding the facts he hopes to discover which would raise
16 issues of material fact for trial. (Dkt. Nos. 220, 245.) Requests for additional time to
17 conduct discovery under Rule 56(d) do not give plaintiffs a free pass to conduct
18 unlimited, wide-ranging, or burdensome discovery absent sufficient justification. As
19 such, plaintiffs seeking an extension of discovery under Rule 56(d) bear the "burden
20 of showing the trial court what facts it hope[s] to discover which would raise issues
21 of material fact." See Ladd v. Law & Tech. Press, 762 F.2d 809, 811 (9th Cir.
22 1985).

23 Plaintiff cites Harris v. Duty Free Shoppers Ltd. Partnership, 940 F.2d 1272,
24 1276 (9th Cir. 1991) for the proposition that "[s]ummary judgment should not be
25 granted before the completion of discovery." In Harris, the Ninth Circuit affirmed a
26 district court's denial of plaintiff Harris' request for extension of discovery under
27
28

1 Rule 56(d)² due to Harris' failure to meet his burden of showing the specific facts he
 2 hoped to discover that would raise an issue of material fact. 940 F.2d at 1276. The
 3 court specifically stated, as this Court has in numerous Orders, that "[o]rdinarily,
 4 summary judgment should not be granted when there are relevant facts remaining to
 5 be discovered, but the party seeking discovery bears the burden of showing what
 6 specific facts it hopes to discover that will raise an issue of material fact." Id.
 7 (quoting Continental Maritime v. Pacific Coast Metal Trades, 817 F.2d 1391, 1395
 8 (9th Cir. 1987)). The court found that the plaintiff had not met that burden and
 9 granted the defendant's motion for summary judgment. Id. Importantly, courts
 10 routinely apply the requirement that a party seeking discovery show what specific
 11 facts it hopes to discover, regardless of the amount of (or lack of) discovery already
 12 completed. See Ladd, 762 F.2d at 811 (9th Cir. 1985) (affirming a trial court's
 13 denial of discovery to plaintiff and grant of summary judgment to defendant three
 14 and one-half-weeks after defendant filed an answer due to plaintiff's failure to
 15 "identify any specific facts that it hoped to discover"). The present case has been
 16 pending for nearly two and a half years. Plaintiff has, to this date, failed to
 17 demonstrate to this Court what specific facts he hopes to discover that would
 18 preclude summary judgment for Defendants.

19 In addition, despite Plaintiff's failure to make the required showing under
 20 Rule 56(d), this Court has twice granted Plaintiff extensions of time to respond to
 21 Defendants' motion for summary judgment. (Dkt. Nos. 220, 245.) In total, Plaintiff
 22 has had over six months of additional time to prepare his opposition. Although
 23 Plaintiff represents himself *pro se*, Plaintiff must still follow the rules of the court in
 24 which he litigates. Carter v. Comm'r, 784 F.2d 1006, 1008-09 (9th Cir. 1986).
 25 Absent any showing by Plaintiff to the contrary, the Court remains unconvinced that
 26 any additional time will result in the revelation of facts that would preclude
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28 ²The court addressed the previous version of Rule 56(d), then numbered Rule 56(f).

1 summary judgment.

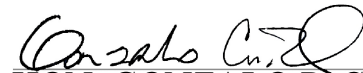
2 **CONCLUSION AND ORDER**

3 For the foregoing reasons, IT IS HEREBY ORDERED that Plaintiff's ex
4 parte motion to strike (Dkt. No. 274) is **DENIED** and Defendant Raymond
5 "Charlie" Wetzel and Defendant City of San Diego's Motion for Summary
6 Judgment (Dkt. No. 204) is **GRANTED**. Accordingly, the Court **VACATES** the
7 motion hearing set to hear this matter on Friday, July 25, 2014.

8 As none of Plaintiff's claims against the City of San Diego or Raymond
9 Wetzel survive summary judgment, the Clerk of Court is directed to terminate the
10 City of San Diego and Raymond Wetzel from the docket.

11 **IT IS SO ORDERED.**

12 DATED: July 21, 2014

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14 HON. GONZALO P. CURIEL
United States District Judge
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